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No. [redacted]

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

VALLEY NEWS
*Petitioner,*

v

JAMES F. McCUSKER
*Respondent.*

**ON APPEAL FROM THE NEW HAMPSHIRE SUPREME COURT**

**PETITION FOR WRIT OF CERTIORARI**

ERNEST L. BELL, III, ESQ.
*Counsel of Record*

BELL, FALK & NORTON, P. A.
Drawer F
Keene, New Hampshire 03431
(603) 352-5950

EDWARD DREW CHENEY, ESQ.
*On the Petition*

## QUESTIONS PRESENTED

1. Was it error for the New Hampshire Supreme Court to conclude that respondent was not a public official as a matter of law when there were no facts in dispute as to respondent's official positions, duties and responsibilities?

2. Was petitioner deprived of its rights under the First and Fourteenth Amendments when the New Hampshire Supreme Court, without having had the issue presented, argued, or briefed by either party, ruled that a libel plaintiff, who had been held by the court *sua sponte* to be neither a public official nor a public figure, may recover upon a showing that libel defendant was negligent in publishing a defamatory falsehood?

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As per Supreme Court Rule 28.1, please be advised that as of the date of the libel, petitioner, Valley Publishing Corp., known as Valley News, did not have an affiliate or parent company. As of the date of the filing of this brief, Valley Printing Company has become a wholly owned subsidiary of Newspapers of New Hampshire, Inc. New Hampshire, Inc. publishes the Holyoke Transcript-Telegram, Holyoke, Massachusetts and the Concord Monitor, Concord, New Hampshire, both daily newspapers. It also owns a 50% interest in Recorder Publishing Co., Inc., the publisher of the Greenfield Recorder, Greenfield, Massachusetts, a daily newspaper. In addition, Newspapers of New Hampshire, Inc. owns 3% of the common stock of Continental Cable Vision, Inc., Boston, Massachusetts.

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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

VALLEY NEWS,
*Petitioner,*

v

JAMES F. MCCUSKER,
*Respondent.*

**ON APPEAL FROM THE NEW HAMPSHIRE SUPREME COURT**

**Petition For Writ of Certiorari**

## OPINIONS BELOW

The opinion of the New Hampshire Supreme Court is reported at 121 NH , 428 A2d 493 (1981). The order by the New Hampshire Supreme Court denying defendant's motion for a rehearing is not reported.

## JURISDICTION

The judgment of the New Hampshire Supreme Court was made and entered on April 3, 1981. Petitioner's Motion to Set

Aside Finding and/or for a Rehearing was denied by the New Hampshire Supreme Court on April 21, 1981. The jurisdiction of this Court is invoked under 28 USC §1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . "

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . "

## STATEMENT OF THE CASE

This libel suit arises from an article published on October 8, 1976, by petitioner in the Valley News, a daily newspaper. The article reported that certain unnamed legislators had alleged that respondent, who was 78 years of age and a brother of the sheriff of Sullivan County, was "being paid $9,000 a year as a part-time deputy sheriff, plus an undetermined amount of money in per diem fees, despite the fact that he is barely ambulatory."[1]

Alleging that these statements were untrue and libelous, respondent brought suit in the Sullivan County Superior Court. Petitioner moved for summary judgment on the grounds that respondent was a public official, that the article related to his official conduct, that the publication was actionable only upon a showing of "actual malice," and that there were no facts that would establish such malice. Both petitioner and respondent filed supporting affidavits. The trial court found that there were

[1] The undisputed facts before the New Hampshire Supreme Court also show that during a substantial portion of respondent's term as sheriff of Sullivan County, his brother served as deputy sheriff. When respondent reached the age of 70, the mandatory retirement age for sheriffs in New Hampshire, he retired and his brother immediately became sheriff and appointed respondent as deputy sheriff.

genuine issues of fact as to whether respondent was a public official and therefore denied summary judgment.

Petitioner appealed to the New Hampshire Supreme Court. Under the provisions of NHRSA 490:9, the following questions of law were transferred by the Superior Court:

A. Was the Superior Court in error in refusing to grant Valley News' Motions for Summary Judgment either in whole or in part?

B. Is plaintiff a public official?

C. Is plaintiff a public figure?

D. Does plaintiff have an action at law based upon the pleadings?

E. Was plaintiff's affidavit sufficient to support the Court's denial of defendant's motion?

Petitioner briefed and argued the following contentions:

I. Plaintiff, as deputy sheriff and superior court bailiff, was at the time of the alleged libel a "public official" and as such defendant is entitled to a summary judgment on its behalf on this issue.

II. Plaintiff, as a deputy sheriff, superior court bailiff and as one who for at least the past forty years has thrust himself into the public life of Sullivan County, was at the time of the alleged libel a "public figure" and as such defendant is entitled to a summary judgment on its behalf on this issue.

III. Summary judgment is the proper remedy in this case and the Superior Court was in error when it ruled that there were genuine issues of material fact insofar as the issue of public official was concerned.

Respondent briefed and argued the following contentions:

I. The New Hampshire Constitution entitles the plaintiff in a defamation action to a jury trial on the issue of whether he is a public official. The Constitution of the United States does not require otherwise.

II. Even if the question of whether the plaintiff is a public official or a public figure were to be decided as a matter of law or on a motion for summary judgment, the court should find that this plaintiff was neither a public official nor a public figure at the time he was defamed.

A. As a deputy sheriff and bailiff at the time of the publication, the plaintiff was not a "public official" within the meaning of *New York Times.*

B. The plaintiff was not a public figure within the meaning of *Gertz* v. *Welch.*

III. Even if the plaintiff were found to be a public official or a public figure, there would be a genuine issue of fact regarding the defendant's malice. The court cannot try issues of fact on a motion for summary judgment.

In a *per curiam* opinion, the New Hampshire Supreme Court held that respondent, as a deputy sheriff, was not a public official or a public figure as a matter of law and was entitled to a jury trial on the issues of whether he was a public official or a public figure and whether petitioner acted with "actual malice." The Court also stated as follows:

> If the plaintiff was neither a public official nor a public figure, then he need not prove knowing falsehood or recklessness. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 343-48. Instead, he may recover compensatory damages upon a showing that the defendant was negligent in publishing a defamatory falsehood. *See id.*, at 349-50.

121 NH , 428 A2d at 494. This was the first time that the New Hampshire Supreme Court had adopted this rule.

On April 8, 1981, Petitioner filed in the New Hampshire Supreme Court a Motion to Set Aside Finding on Issue Not Briefed and/or for a Rehearing. In this motion, Petitioner argued that the finding quoted above was on an issue which was not among the questions transferred and which was neither argued nor briefed by either party. Petitioner also pointed out that the resolution of this issue is of crucial importance not only to the parties involved in this particular litigation but also to all

parties actually or potentially involved in defamation litigation in New Hampshire. Defendant argued that it was inequitable and unfair to adopt a new rule for the standard of liability in defamation cases brought by private plaintiffs without the matter being fully presented, briefed and argued.

Petitioner requested that the New Hampshire Supreme Court reconsider its decision in toto and stressed the fact that petitioner and other interested parties be allowed to brief and argue the issue of what standard of liability should apply in cases brought by plaintiffs who are neither public figures nor public officials. In addition, the Monitor Publishing Co., Inc., which publishes a daily newspaper in Concord, New Hampshire, filed a motion requesting essentially the same relief as defendant had requested. Nonetheless, on April 21, 1981, defendant's motion for rehearing was denied.

## STAGE OF PROCEEDINGS AT WHICH FEDERAL QUESTIONS WERE RAISED

The first federal question raised in this appeal is whether it was error for the New Hampshire Supreme Court to conclude that respondent, a deputy sheriff, was not a public official as a matter of law when there were no facts in dispute as to respondent's official position, duties and responsibilities.

The second federal question raised in this appeal is what standard of liability should apply in a libel suit brought by a plaintiff who is neither a public official nor a public figure. This question was first raised and decided *sua sponte* by the New Hampshire Supreme Court in the written opinion it released on April 3, 1981. Neither petitioner nor respondent ever received an opportunity to brief or argue this question, either before or after the New Hampshire Supreme Court made its decision.

The third federal question raised in this appeal is whether the New Hampshire Supreme Court deprived defendant of due process when, without giving defendant an opportunity to brief or argue the issue, it ruled that a private plaintiff in a libel

action may recover compensatory damages merely upon showing that a defendant was negligent in publishing a defamatory falsehood. This question was first raised on April 8, 1981, when defendant filed a Motion to Set Aside Finding on Issue Not Briefed and/or for a Rehearing. In this motion Petitioner argued that it was inequitable and unfair for the New Hampshire Supreme Court to adopt this new rule without giving Petitioner the opportunity to brief or argue the issue. On April 21, 1981, the New Hampshire Supreme Court denied this motion.

## ARGUMENT

### THE RESPONDENT, A DEPUTY SHERIFF AT THE TIME OF PUBLICATION, WAS A PUBLIC OFFICIAL AS A MATTER OF LAW.

Throughout the pendency of the instant case, there has never been any factual dispute as to the official position, duties and responsibilities of respondent. Although there existed no genuine issues of fact as to respondent's service in public office since 1943, the trial court ruled that partial summary judgment on the "public official" issue was inappropriate, and this ruling was affirmed by the New Hampshire Supreme Court. This was clear error, especially in light of this Court's statement that the decision as to whether the plaintiff in a defamation action is a public official is "for the trial judge in the first instance." *Rosenblatt* v. *Baer*, 383 U.S. 75, 88 (1966).

The New Hampshire Supreme Court expressly recognized respondent's background as a law officer and set forth the history of his service in public office:

> The plaintiff in this case was the sheriff of Sullivan County, an elective office, from 1943 to 1966. At the time of the publication in question, he was a deputy sheriff under an appointment of his brother, then the sheriff. In his capacity as deputy sheriff, the plaintiff's duties consisted of serving process, interviewing complainants, doing investigative work, and acting as bailiff for the superior court. The plaintiff has served as president of the New Hampshire Sheriff's Association. In 1955, he organized the Sullivan County Peace Officers' Association. In the late 1930's, he was the president of the Permanent Fireman's

> Association, and in 1939 he authored a legislative bill providing for firemen's retirement. He has been active over the years in political campaigns and has spoken to service and women's clubs.

App. at 7a.

The New Hampshire Supreme Court held that the trial court was correct in holding that genuine issues of fact existed which precluded summary judgment, yet the petitioner has never contested the accuracy of the facts recited by the New Hampshire Supreme Court. While this Court has expressed some reservations as to the propriety of summary judgment *on the merits* in libel suits, *Hutchinson* v. *Proxmire*, 443 U.S. 111, 120 n.9 (1979), it has never suggested that particular legal issues should not be decided by the court prior to trial. Where there are no facts in dispute, the trial court must "in the first instance" make the determination as to whether a libel plaintiff is a public official. *Cf. Rosenblatt* v. *Baer, supra.*

In the instant case, had the trial court or New Hampshire Supreme Court ruled on this issue, the decision would have to have been that respondent was a public official. The uncontested facts revealed that respondent had served as sheriff from 1943 to 1966. In 1966, when the respondent was forced to retire (due to state constitutional provisions governing retirement age for sheriffs), his brother was elected sheriff and the respondent was appointed deputy sheriff and was serving in that capacity at the time of the publication of which he complained. That publication raised doubts as to the respondent's ability to serve as deputy sheriff and was directly related to his official conduct in office.

In *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), this Court established the constitutional rule that public official libel plaintiffs had to prove "actual malice" in order to recover. In footnote 23, the Court noted that it was not necessary, in that case, to fully delineate "how far down into the lower ranks of government employees the 'public official' designation would extend," but it did conclude that the plaintiff, a City Commissioner in charge of the police department, clearly was a public

official. In *St. Amant* v. *Thompson*, 390 U.S. 727 (1968), the plaintiff was a deputy sheriff (just as respondent herein). Without hesitation, this Court accepted the lower court's determination that a deputy sheriff had "substantial responsibility for or control over the conduct of governmental affairs" under the test established in *Rosenblatt* v. *Baer, supra*, and, therefore, was a public official. 390 U.S. at 730, n.2.

Numerous other cases throughout the country have concluded, as a matter of law, that law enforcement officers are public officials: *Meiners* v. *Moriarity*, 563 F.2d 343 (7th Cir. 1977) (Agent From Drug Abuse Law Enforcement Agency of the U.S. Department of Justice); *Gray* v. *Udevitz*, 5 Media L. Rptr. 1412 (D. Wyo. 1979) (Ex-policeman Regarding Conduct as Policeman); *Ethridge* v. *North Mississippi Communications, Inc.*, 460 F. Supp. 347 (N.D. Miss. 1978) (Undercover Narcotics Agent); *Kidder* v. *Anderson*, 354 So. 2d 1306 (La. 1978) (Police Chief); *Colombo* v. *Times-Argus Ass'n*, 380 A. 2d 80 (Vt. 1977) (Police Patrolman); *Ammerman* v. *Hubbard Broadcasting, Inc.*, 91 N.M. 250, 572 P. 2d 1258 (1977) (Deputy Sheriff); *McCarney* v. *Des Moines Register & Tribune Co.*, 239 N.W. 2d 152 (Iowa 1976) (Police Captain). And the New Hampshire courts themselves, in different contexts, have recognized that deputy sheriffs are public officials:

> We think that it must be true that sheriffs and their deputies, *like other public officers*, are under a general duty to exercise reasonable skill and diligence in performance of their *official duties* . . . The official *duties* of *sheriffs* and their *deputies* are numerous and diversified . . .

*Demers* v. *Bisbee*, 106 NH 354 at 356, 211 A. 2d 416 (1965) (emphasis added).

In light of the above cases and the undisputed facts in the instant case, the trial court, when presented with a motion for summary judgment on the public official issue, had an affirmative duty to render a ruling that the respondent was a public official, at least in regard to the allegedly defamatory article which dealt only with his fitness for office and his official conduct.

## THE NEW HAMPSHIRE SUPREME COURT ERRED IN *SUA SPONTE* HOLDING THAT A NEGLIGENCE STANDARD WAS APPLICABLE IN A NON PUBLIC OFFICIAL/ PUBLIC FIGURE LIBEL CASE

The decision by the New Hampshire Supreme Court should be reviewed because it erroneously holds that a private plaintiff in a libel action may recover damages merely upon showing that the defendant was negligent in publishing a defamatory falsehood. This conclusion was reached without analysis of any underlying policy considerations and with reference to only one authority, the decision by this Court in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). In *Gertz*, this Court held by a five to four majority that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.*, 418 U.S. at 347.[2]

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[2] Several states have adopted a negligence standard in libel actions brought by private individuals. *See, e.g., Peagler* v. *Phoenix Newspapers, Inc.*, 114 Ariz. 309, 560 P2d 1216 (1977); *Cahill* v. *Hawaiian Paradise Park Corp.*, 56 Hawaii 522, 543 P2d 1356 (1975); *Martin* v. *Griffin Television, Inc.*, 549 P2d 85 (Okla. 1976). Several others have chosen to apply the "actual malice" standard. *See, e.g., Peisner* v. *Detroit Free Press*, 82 Mich. App. 153, 266 NW2d 693 (1978); *Walker* v. *Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P2d 450, *cert. denied* 423 U.S. 1025 (1975). In *Walker*, the Colorado Supreme Court said that it adopted the "actual malice" standard:

> simply from [its] conclusion that a simple negligence rule would cause such a chilling effect upon the news media that it would print insufficient facts in order to protect itself against libel actions and that this insufficiency would be more harmful to the public interest than the possibility of lack of adequate compensation to a defamation injured private individual.

188 Colo. at 99, 538 P2d at 458.

New York has adopted a third standard. In *Chapadeau* v. *Utica Observer-Dispatch, Inc.*, 38 NY2d 196, 199, 379 NYS2d 61, 341 NE2d 569 (1975), the New York Court of Appeals held that "where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover" upon establishing "by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."

For several reasons, this Court should now overturn this holding and instead require that civil libel plaintiffs should be required to prove actual malice, *see New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), in actions concerning media reports of the involvement of private individuals in events of public or general interest. *See Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971); *Gertz, supra*, 418 U.S. at 361 (Brennan, J., dissenting). As Mr. Justice Brennan stated in his dissenting opinion in *Gertz*, 418 U.S. at 366-67:

> Adoption, by many States, of a reasonable-care standard in cases where private individuals are involved in matters of public interest—the probable result of today's decision—will . . . lead to self-censorship since publishers will be required carefully to weigh a myriad of uncertain factors before publication. The reasonable-care standard is "elusive," *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967); it saddles the press with "the intolerable burden of guessing how the jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait." *Ibid.* Under a reasonable-care regime, publishers and broadcasters will have to make pre-publication judgments about juror assessment of such diverse considerations as the size, operating procedures, and financial condition of the news-gathering system, as well as the relative costs and benefits of instituting less frequent and more costly reporting at a higher level of accuracy. *See* The Supreme Court, 1970 Term, 85 Harv. L. Rev. 3,228 (1971). Moreover, in contrast to proof by clear and convincing evidence required under the *New York Times* test, the burden of proof for reasonable care will doubtless be the preponderance of the evidence.
>
> 'In the normal civil suit where [the preponderance of the evidence] standard is employed, "we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroenous verdict in plaintiff's favor." *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring). In libel cases, however, we view an erroneous verdict for the plaintiff as

> most serious. Not only does it mulct the defendant for an innocent misstatement . . . but the possibility of such error, even beyond the vagueness of the negligence standard itself, would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate.' *Rosenbloom*, 403 U.S. at 50.
>
> And, most hazardous, the flexibility which inheres in the reasonable-care standard will create the danger that a jury will convert it into 'an instrument for the suppression of those "vehement, caustic, and sometimes unpleasantly sharp attacks . . ." which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail.' *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 277 (1971).

*Gertz* was a five to four decision by this Court. The deciding vote in favor of the majority was cast by Mr. Justice Blackmun, whose primary rationale was as follows:

> By removing the specters of presumed and punitive damages in the absence of *New York Times* malice, the Court eliminates significant and powerful motives for self-censorship that otherwise are present in the traditional libel action. By so doing, the Court leaves what should prove to be sufficient and adequate breathing space for a vigorous press. What the Court has done, I believe, will have little, if any, practical effect on the functioning of responsible journalism.

*Gertz, supra*, 418 U.S. at 354 (Blackmun, J., concurring).

Petitioner submits that the elimination of punitive damages in libel cases involving mere negligence does not diminish the motivation for self-censorship because the specter of actual damages is a sufficient motive for self-censorship in such cases. Judges and juries all across our country have been assessing extravagant "actual" damages in libel actions against media defendants. Such verdicts have indeed had a "killing effect" on the functioning of responsible journalism.

Thus, the adoption of a "negligence" or "reasonable-care" standard in libel actions is so lenient and vague that it has resulted and will continue to result in intolerable self-censorship by responsible journalists. This Court should therefore take this opportunity to over-rule its decision in *Gertz*. Petitioner submits that this Court should instead adopt the standard endorsed by Mr. Justice Brennan in his plurality opinion in *Rosenbloom* and his dissenting opinion in *Gertz*. Under this standard, states would have to "apply the *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) knowing-or-reckless-falsity standard in civil libel actions concerning media reports of the involvement of private individuals in events of public or general interest." *Gertz, supra*, 430 U.S. at 361 (Brennan, J., dissenting).

The ruling by the New Hampshire Supreme Court that private plaintiffs "may recover compensatory damages upon a showing that the defendant was negligent in publishing a defamatory falsehood," 121 NH at , 428 A2d at 494, was on an issue which had not been among the questions transferred and which had been neither argued nor briefed by either party. By resolving this crucial issue in so summary a fashion, the New Hampshire Supreme Court deprived petitioner of due process.

The application of the prohibition against any state deprivation of life, liberty, or property without due process of law requires a two-stage analysis. First, this Court must ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of "life, liberty or property." Second, if protected interests are implicated, this Court must then decide what procedures constitute "due process of law." *Ingraham* v. *Wright*, 430 U.S. 651 (1977). *See also Meachum* v. *Fano*, 427 U.S. 215, *rehearing denied* 429 U.S. 873 (1976).

In this case, petitioner Valley News certainly has protected liberty and property interests in minimizing its potential liability for defamatory falsehoods when publishing news stories on matters of public interest. The standard of liability applicable in libel actions against the petitioner will have wide-ranging effects on every aspect of its operation, from its operating

procedure to its editorial policy to its financing and insurance coverage. The right to follow a chosen profession free from unreasonable governmental interference falls within the meaning of the "liberty" and "property" concepts of the Fourteenth Amendment. *U.S.* v. *Robel*, 389 U.S. 258 (1967); *Greene* v. *McElroy*, 360 U.S. 474 (1959). The meanings of "liberty" and "property" are broad indeed; they are left to gather meaning from experience and they relate to the whole domain of social and economic facts. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

Since there are liberty and property interests at stake here, due process requires that any adjudication be preceded by notice and an opportunity to be heard appropriate to the nature of the case. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The notice must be reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Robinson* v. *Hanrahan*, 409 U.S. 38 (1972); *Armstrong* v. *Manzo*, 380 U.S. 545 (1965); *Mullane*, *supra*. The proceeding or hearing must be appropriate, fair, adequate, and such as is practicable or reasonable in the particular case. *See, e.g., Boddie* v. *Connecticut*, 401 U.S. 371 (1971). In the instant case, the petitioner was deprived both of notice and the opportunity to be heard prior to the New Hampshire Supreme Courts' decision as to the standard of liability to be applied in private individual libel cases.

## CONCLUSION

Respondent is without question a public official. The facts, as before the New Hampshire Supreme Court and cited in its opinion, regarding his position within the governmental framework of New Hampshire are undisputed. The Court below fell into serious error in refusing to find respondent a public official as a matter of law. A deprivation of petitioner's First Amendment rights has occurred as a result of the refusal to find respondent a public official.

In the case at bar, petitioner was given absolutely no notice or opportunity to be heard on the crucial issue concerning the appropriate standard of liability prior to the New Hampshire Supreme Court's adoption of a negligence standard in libel cases involving private plaintiffs. The issue was neither briefed nor argued by any of the parties. Moreover, it was not one of the issues transferred by the Sullivan County Superior Court. The New Hampshire Supreme Court thereby violated petitioner's Fourteenth Amendment right to due process.

Respectfully submitted,

VALLEY NEWS
By its Attorneys

BELL, FALK & NORTON
A Professional Association

By ERNEST L. BELL, III
ERNEST L. BELL, III

and

By EDWARD DREW CHENEY
EDWARD DREW CHENEY

# APPENDIX

# APPENDIX


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**THE STATE OF NEW HAMPSHIRE**

**SULLIVAN, SS.** **SUPERIOR COURT**
**CIVIL #8591** **FEBRUARY TERM, 1980**

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**James F. McCusker**

**vs**

**Valley News**

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## INTERLOCUTORY APPEAL FROM RULING

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## STATEMENT OF THE CASE

This is an action entitled "In a plea of trespass and libel . . ." wherein plaintiff, a deputy sheriff, bailiff and former high sheriff, sued a newspaper for certain statements regarding his health and earnings published in a report on his brother's political campaign. A copy of the article in question as published in the Valley News on October 8, 1976, is attached.

Defendant filed a Motion for Summary Judgment wherein it requested that based upon plaintiff's status as a public official and/or a public figure it was entitled to a judgment in its favor. Plaintiff countered with an affidavit and a statement of a Superior Court justice [not under oath]. After hearing, the Superior Court denied defendant's request and further stated that the "affidavits submitted disclose a genuine issue of material fact which requires a formal trial on the merits . . ." Defendant timely excepted.

## STATEMENT OF THE FACTS

The article in question is attached and is self-explanatory. Plaintiff was at the time a deputy sheriff, bailiff and had been high sheriff of Sullivan County. The article attributes certain statements about his health and earnings to certain members of the county delegation. Plaintiff claims damages as a result of these statements.

## QUESTIONS OF LAW

The following questions of law are transferred in accordance with RSA 491:17, Supreme Court Rules 8 and 9 and Superior Court Rule 79:

A. Was the Superior Court in error in refusing to grant Valley News' Motion for Summary Judgment either in whole or in part?

B. Is plaintiff a public official?

C. Is plaintiff a public figure?

D. Does plaintiff have an action at law based upon the pleadings?

E. Was plaintiff's affidavit sufficient to support the Court's denial of defendant's motion?

## REASONS FOR GRANTING AN INTERLOCUTORY APPEAL

The Court's attention is respectfully directed to the attached Valley News' Memorandum of Law filed in the Superior Court that sets forth in detail its position upon the basic question here as to whether plaintiff is a public official and/or a public figure.

It is essential that this determination be made prior to the start of trial in this matter. As can be appreciated from the ruling in *Baer* v. *Rosenblatt*, 108 NH 368 (1967) that the Supreme Court has not passed upon the use of the summary judgment procedure in newspaper libel cases. *Rosenblatt* was decided in 1967 and the summary judgment statute (RSA 491:8-a) was expanded in 1973 to cover situations such as the one at bar.

The consideration of this question by the Supreme Court would serve to simplify the issues at trial and clarify issues of general importance in the administration of justice in the field of libel law. Also to be determined in this matter is whether or not plaintiff's affidavit was sufficient to meet the challenge presented by defendant's motion.

## EXHIBITS ATTACHED

1. Plaintiff's writ.
2. Valley News article of October 8, 1976.
3. Defendant's Motion for Summary Judgment and Affidavit.
4. Plaintiff's Reply with Affidavit and Attachment.
5. Defendant's Memorandum of Law.
6. Court's Order, April 9, 1980.

/s/ ROBERT H. TEMPLE

Presiding Justice
4-30-80

**Sullivan**
**No. 80-197**

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**James F. McCusker**

**v.**

**Valley News**

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**April 3, 1981**

*Brown & Nixon P. A.*, of Manchester, (*Stanley M. Brown & a.* on the brief and *Mr. Brown* orally), for the plaintiff.

*Bell, Falk & Norton*, of Keene (*Ernest L. Bell, III*, on the brief and orally), for the defendant.

PER CURIAM. The issue in this libel case is whether the trial court erred in denying the defendant's motion for summary judgment. We uphold the trial court.

On October 8, 1976, the defendant published an article written by one of its staff writers, Jan Slusmon, who reported that certain unnamed legislators had alleged that the plaintiff, who at that time was 78 and the brother of the then sheriff of Sullivan County, was "being paid $9,000 a year as a part-time deputy sheriff, plus an undetermined amount of money in per diem fees, despite the fact that he is barely ambulatory."

The plaintiff brought suit alleging that the statements were untrue and libelous. The defendant moved for summary judgment, on the grounds that the plaintiff is, and has been since 1944, a public official, that the article related to his official conduct, that the publication is actionable only on a showing of "actual malice," and that there are no facts that would establish such malice. Jan Slusmon also filed a supporting affidavit claiming that he had accurately reported the legislators' statements and that he had no reason to doubt that the statements were substantially true. The Trial Court (*Temple, J.*) found that there were genuine issues of fact as to whether the plaintiff was a public official and as to whether proof of "actual malice"

was required in order for the plaintiff to recover, and therefore denied summary judgment. The defendant appealed.

If the plaintiff was a public official or a public figure, then, in order to recover for injury to reputation, he would have to prove not only that the defamatory statement was false but also that the defendant published it with knowledge that it was false or with reckless disregard for the truth. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 42 (1974); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 162-65 (1967) (*Warren*, C.J., concurring); *New York Times Co.* v. *Sullivan*, 387 U.S. 254, 279-80 (1964). If the plaintiff was neither a public official nor a public figure, then he need not prove knowing falsehood or recklessness. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 343-48. Instead, he may recover compensatory damages upon a showing that the defendant was negligent in publishing a defamatory falsehood. *See id.* at 349-50.

Not all government employees are public officials within the meaning of *New York Times Co.* v. *Sullivan*. In order to show that the plaintiff is a public official under *New York Times*, the defendant must prove that the plaintiff's "position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees . . . ." *Rosenblatt* v. *Baer*, 383 U.S. 75, 86 (1966). In the *Rosenblatt* case, the United States Supreme Court "remarked" that the decision as to whether the plaintiff in a defamation action is a public official is "for the trial judge in the first instance." *Id.* at 88. However, in *Baer* v. *Rosenblatt*, 108 N.H. 368, 370-71, 237 A.2d 130, 132-33 (1967), decided after remanded from the Supreme Court, we held that the Constitution of this State, N.H. CONST. pt. I, arts. 14 and 20, entitled the plaintiff to a jury trial on this issue with proper instructions from the court. We reinforced this position in *Thomson* v. *Cash*, 119 N.H. 371, 378, 402 A.2d 651, 656 (1979).

In remarking that the issue of whether an individual is a public official was in the first instance for the trial judge, the

United States Supreme Court was concerned with the possibility that a jury, in making the determination, would be influenced by its view of the defendant and his publication. *See Rosenblatt* v. *Baer*, 383 U.S. at 88 n. 15. This concern is not unlike that expressed in *Jackson* v. *Denno*, 378 U.S. 368 (1964), with respect to the determination of the voluntariness of confessions. We are of the opinion, however, that this concern can be dispelled by careful instructions to the jury and by the use of a special verdict on the public official issue. *See Baer* v. *Rosenblatt*, 108 N.H. at 371, 237 A.2d at 133.

Whether this issue shou be "tried separately and in advance of other issues" is a matter best left to the sound discretion of the trial court. *Id.*

What we have said with regard to the public official issue also applies to the issue of whether the plaintiff was a public figure as defined in such cases as *Wolston* v. *Reader's Digest Assn. Inc.*, 443 U.S. 157, 164 (1979); *Time, Inc.* v. *Firestone*, 424 U.S. 448, 453 (1976); and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 344-47.

The plaintiff in this case was the sheriff of Sullivan County, an elective office, from 1943 to 1966. At the time of the publication in question, he was a deputy sheriff under an appointment of his brother, then the sheriff. In his capacity as deputy sheriff, the plaintiff's duties consisted of serving process, interviewing complainants, doing investigative work, and acting as bailiff for the superior court. The plaintiff has served as president of the New Hampshire Sheriff's Association. In 1955, he organized the Sullivan County Peace Officers' Association. In the late 1930's, he was the president of the Permanent Fireman's Association, and in 1939 he authored a legislative bill providing for firemen's retirement. He has been active over the years in political campaigns and has spoken to service and women's clubs.

The plaintiff's position as a deputy sheriff does not place him in the category of a public official as a matter of law. Neither can we say that the plaintiff was a public figure as a matter of law. The trial court was correct in holding that

genuine issues of fact existed which required the denial of summary judgment for the defendant.

We also agree with the plaintiff that, even assuming that the *New York Times* test of "actual malice" does apply, there are genuine issues of fact in this case. Even if there may be cases in which summary judgment would be appropriate, this is not one of them. *See Hutchinson* v. *Proxmire*, 443 U.S. 111, 120 n. 9 (1979); *Thomson* v. *Cash*, 119 N.H. 371, 402 A.2d 651 (1979).

*Exceptions overruled; remanded.*

GRIMES, C. J., did not sit.

THE STATE OF NEW HAMPSHIRE

SULLIVAN, SS. 1981 TERM
APRIL SESSION

SUPREME COURT
#80-197

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James F. McCusker

v.

Valley News

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**DEFENDANT VALLEY NEWS' MOTION TO SET ASIDE FINDING ON ISSUE NOT BRIEFED AND/OR FOR A REHEARING**

NOW COMES defendant Valley News and says:

1. This is a libel case by a deputy sheriff against a daily newspaper.

2. On April 3, 1981, this Court decided an Interlocutory Appeal in which the questions of law transferred by the Superior Court were:

A. Was the Superior Court in error in refusing to grant Valley News' Motions for Summary Judgment either in whole or in part?

B. Is plaintiff a public official?

C. Is plaintiff a public figure?

D. Does plaintiff have an action at law based upon the pleadings?

E. Was plaintiff's affidavit sufficient to support the Court's denial of defendant's motion? (p2 IA)

3. Plaintiff briefed and argued the following questions presented for review:

1. Does the New Hampshire Constitution entitle the plaintiff to the decision of a jury on the question of whether he is a public official?

2. As a deputy sheriff and bailiff at the time of the publication, was the plaintiff a "public official" within the meaning of *New York Times* v. *Sullivan*?

3. Is the plaintiff a public figure either for all purposes or for the limited purpose of the publication in question?

4. Was the Superior Court in error in refusing to grant the Motion for Summary Judgment either in whole or in part? (pl PLB)

4. Defendant briefed the following "Questions Presented for Review":

1. Is plaintiff a public official?

2. Is plaintiff a public figure?

3. Does plaintiff have an action at law based upon the pleadings?

4. Was plaintiff's affidavit sufficient to support the Court's denial of defendant's motion?

5. Was the Superior Court in error in refusing to grant Valley News' Motions for Summary Judgment either in whole or in part? (pl DB)

5. The defendant's arguments in this matter were as follows:

I. Plaintiff, as a deputy sheriff and superior court bailiff, was at the time of the alleged libel a "public official" and as such defendant is entitled to a summary judgment on its behalf on this issue.

II. Plaintiff, as a deputy sheriff, superior court bailiff and as one who for at least the past forty years has thrust himself into the public life of Sullivan County was at the time of the alleged libel a "public figure" and as such defendant is entitled to a summary judgment on its behalf on this issue.

III. Summary judgment is the proper remedy in this case and the Superior Court was in error when it ruled that there were genuine issues of material fact insofar as the issue of public official was concerned. (pl BD)

6. On Page 2 of the April 3, 1981, slip opinion, the Court rules:

> If the plaintiff was neither a public official nor a public figure, then he need not prove knowing falsehood or recklessness. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 343-48. Instead, he may recover compensatory damages upon a showing that the defendant was negligent in publishing a defamatory falsehood. *See, Id.*, at 349-50.

7. The findings set forth in paragraph 6 were not argued or briefed by either party before this court and were not in the questions transferred.

8. The matters set forth in paragraph 6 have not been decided by this Court since the decision in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 343-48 (1974). These issues are of considerable importance to not only the parties involved in this particular litigation but to all parties involved in defamation litigation in this state.

9. It is inequitable and unfair not only to the defendant in this case but also to all those involved in any sort of public information work to have the rule of simple negligence adopted in defamation cases without the matter being fully presented, briefed, and argued to this Court.

10. Defendant, and any *amicus curiae* that are interested, should be allowed the right to brief and argue the point set

forth in paragraph 6 in the event that the Court does not strike the material set forth in paragraph 6.

WHEREFORE, defendant Valley News moves:

A. The decision of April 3, 1981, be reconsidered;

B. The material set forth in paragraph 6 above be stricken from the decree in this matter;

C. Or in the alternative, the issue of the standard of care in a nonpublic official, nonpublic figure defamatory falsehood (libel) case be reconsidered and the defendant, and others, if interested, be allowed to brief and argue this particular point; and

D. For such other relief as may be equitable and just.

Respectfully submitted,

VALLEY NEWS
By its Attorneys

BELL, FALK & NORTON
A Professional Association

/s/ By ERNEST L. BELL, III
Ernest L. Bell, III

I hereby certify that a copy of the within motion was forwarded to Stanley M. Brown, Esq., this 8th day of April, 1981.

/s/ ERNEST L. BELL, III
Ernest L. Bell, III

**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**1981 TERM**
**APRIL SESSION**

**No. 80-197**

---

**James F. McCusker**

**v.**

**Valley News**

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## MOTION

NOW COMES Monitor Publishing Co., Inc. (hereinafter "Monitor Publishing"), publisher of the *Concord Monitor*, a daily newspaper having its principal circulation in the Greater Concord, New Hampshire area, and respectfully moves the Court pursuant to Rule 21 of the *Rules of the Supreme Court* to reconsider its decision in *McCusker* v. *Valley News* (decided April 3, 1981) as follows:

(1) Monitor Publishing has requested and been provided with a copy of the motion for rehearing filed by the *Valley News* in this action.

(2) As the publisher of a daily newspaper, Monitor Publishing is a potential defendant in libel actions instituted by private figures. It, therefore, has a real and substantial interest in the standard of care applicable to a publisher of an allegedly defamatory falsehood in a private figure libel action. Such standard of care also is of urgent and grave concern to members of the press who publish or broadcast in this state.

(3) Based upon the motion for rehearing filed by the *Valley News*, Monitor Publishing understands that in the interlocutory appeal of this action neither party briefed or argued the question of the appropriate standard of care in a private figure libel action.

WHEREFORE, Monitor Publishing Co., Inc. joins the *Valley News* and respectfully requests the Court either to delete the last sentence of the first full paragraph of page 2 of the Slip Opinion or, alternatively, to grant the *Valley News*' motion for rehearing, and permit the parties and *amicus curiae* parties to file briefs and argue this important question of law; and for such other relief as may be just.

Respectfully submitted,

MONITOR PUBLISHING CO., INC.
By its Attorneys,

ORR AND RENO, P. A.
95 North Main Street
P. O. Box 709
Concord, New Hampshire 03301

/s/ By WILLIAM L. CHAPMAN
William L. Chapman

Dated: April 13, 1981

## CERTIFICATE OF SERVICE

I, William L. Chapman, Esquire, hereby certify that on this 13th day of April, 1981, I have caused a copy of the foregoing Motion to be mailed to Ernest L. Bell, III, Esquire, attorney for Valley News, and Stanley M. Brown, Esquire, attorney for James F. McCusker.

/s/ WILLIAM L. CHAPMAN
William L. Chapman

**SUPERIOR COURT OF NEW HAMPSHIRE**

**SULLIVAN COUNTY**

May 7, 1981

Re: 8591 *McCusker* v. *Valley News*

Gentlemen:

Please be advised that on May 7, 1981 the N.H. Supreme Court made the following order relative to the above-captioned case:

4-3-81 Exceptions overruled; remanded.

4-21-81 Motion for rehearing denied.

A certificate of said order dated May 4, 1981 was filed in this office on May 7, 1981.

Very truly yours,

/s/ HENRY SHAHEEN

Henry Shaheen
*Clerk*